CASE NOTES

NATIONAL INSURANCE CO. OF NEW ZEALAND LTD v. ESPAGNE[1]

PAFF v. SPEED[2]

Damages—Personal injuries—Statutory pension awarded—Matters to be considered in reduction of damages

Damages—Personal injuries—Statutory pension awarded—Matters to be considered in reduction of damages—Admissibility of evidence concerning the plaintiff's pension

In recent years Welfare Societies, Insurance Companies and the State have been providing, more generously than ever before, certain aids which lighten the monetary burden of illness or incapacity. The aids take the form of hospital and pharmaceutical benefits, statutory pensions and insurance against accidents and injury. These aids, which are a result of an increasing trend towards welfare state philosophy, raise the problem of how they are to effect legal responsibility in tort litigation.[3] Is it justifiable to permit an injured person to recover both the benefits he receives as the result of an injury (for example statutory pension payments) and common law damages, beyond the maximum which he could recover from either source alone? This question is answered in the affirmative by the High Court in *National Insurance Co. of New Zealand Ltd v. Espagne*.[4]

The plaintiff Espagne, became totally blind and suffered considerable brain damage as the result of injuries received when a motor car in which he was travelling, ran off the road and overturned, as the result of the negligent driving of one of the defendants. Under section 24 of the Commonwealth Social Services Act 1947-59 the Director-General of Social Services granted[5] Espagne a pension of which £526 had been paid by the time of the trial. Stanley J. in the Supreme Court of Queensland awarded Espagne £24,491 as damages for the personal injuries he received. His Honour declined to make any deduction for the pension already received by Espagne under the Social Services Act or for the continuance of the pension in the future. The National Insurance Co. of New Zealand Ltd, one of the defendants, appealed to the High Court claiming that the damages were excessive, and that the invalid pension should be a factor mitigating damages.

[1] (1961) 35 A.L.J.R. 4; [1961] Argus L.R. 627. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Menzies and Windeyer JJ.

[2] (1961) 35 A.L.J.R. 17; [1961] Argus L.R. 614. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Menzies and Windeyer JJ.

[3] See W. G. Friedmann 'Social Insurance and the Principles of Tort Liability' (1949) 63 *Harvard Law Review* 241, 253-260.

[4] (1961) 35 A.L.J.R. 4.

[5] The pension is not awarded 'as of right' but is granted in the exercise of an administrative discretion on the part of the Director-General: see ss. 24, 28 and 46. This is so notwithstanding the special provisions relating to blind persons in ss. 22 (9), 24 (a), 25 (1) (d), 25 (2), 27 (1) (a), 28, 36 and 46 (2) of the Social Services Act 1947-1959.

The High Court held that in the assessment of damages an invalid pension awarded under the Social Services Act 1957-59 in respect of a condition of total blindness which was a result of the accident, is not, either in its operation up to the date of the trial or in its future operation, a matter going to the reduction of damages. The decision was a unanimous one but the reasons for reaching it were not and in fact varied considerably.

Dixon C.J.[6] and Windeyer J.[7] investigated the more general problem of whether an advantage, actually or possibly accruing to a plaintiff, which, but for his injuries he would not have obtained, is to be regarded in the assessment of damages. Their Honours were wary of stating a general rule to cover all such cases.[8] Dixon C.J. claimed that advantages will not be taken into account in reduction of the plaintiff's damages when

> . . . they are conferred on him not only independently of the existence in him of a right of redress against others but so that they may be enjoyed by him although he may enforce that right: they are the product of a disposition in his favour intended for his enjoyment and not provided in relief of any liability in others fully to compensate him.[9]

Windeyer J. put forward almost the same rule when he said that benefits the plaintiff receives from a source other than the defendant are not to be regarded as mitigating his loss if

> . . . they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages.[10]

The test here is by purpose rather than cause (that is, one enquires as to the intention and not as to whether the benefit is received in consequence of, or as a result of the injury).

Both the Judges criticized the impracticability as a test of relevancy of applying terms like a collateral advantage which is *res inter alios acta* as a description of the advantage to be disregarded and *causa sine qua non* or *causa causans* as a description of the relation of the injury to the advantage. Dixon C.J. claimed that such terms 'tell me nothing'.[11] But unfortunately, neither McTiernan J. nor Menzies J. took heed of this criticism for both based their judgments on causation grounds which in many cases appear to be no more than a 'convenient formula for purporting to justify an opinion which in fact proceeds from an intuitive sense of justice applied to the case as a whole'.[12] McTiernan J.[13] claimed that the pension would not mitigate damages as the injury is not the *causa causans* of the receipt of the pension. Menzies J.[14] adopted the reasoning of Bramwell B. in *Bradburn v. Great Western Railway Co.*,[15]

[6] (1961) 35 A.L.J.R. 4, 5-6. [7] *Ibid.* 15-17.
[8] In *dicta* Dixon C.J. said: 'it appears to be futile to look in the present state of the law for a rule of general application capable of furnishing a ready solution to all or most such questions.' *Ibid.* 5. [9] *Ibid.* 5. [10] *Ibid.* 16. [11] *Ibid.* 5.
[12] Glanville Williams 'The Two Negligent Servants' (1954) 17 *Modern Law Review* 66, 68-69. [13] (1961) 35 A.L.J.R. 4, 6.
[14] *Ibid.* 9. [15] (1874) L.R. 10 Ex. 1.

claiming that the pension is to be disregarded on the basis that it was not made because of the accident notwithstanding that the occasion for the payment was the accident and its consequences. But why should the Social Services Act and not the accident be the cause of the pension? The reasoning of Menzies J. introduces a thin and arbitrary distinction which would tend to confuse rather than clarify when cited as a test in future litigation.

The decision of the Court would appear to be correct in law.[16] It has been a generally accepted rule that aid from friends and philanthropic persons is disregarded, even in actions under Lord Campbell's Act.[17] Also benefits which a plaintiff receives because of a contract made before the loss occurred, whose terms granted the benefits notwithstanding any rights of action the plaintiff might have had, do not mitigate damages (for example, accident insurance and benefits provided by employers).[18] In law, it is quite logical that a statutory pension could not be regarded as relevant to 'loss of wages' in the field of special damages or to 'loss of earning capacity' in the field of general damages as it comes under neither head.[19] Thus it must be disregarded.

The question must arise as to whether the decision is in accord with present social requirements. The main reason for the decision would appear to be that the pension was given for the benefit of the sufferer and not the wrongdoer. This is why the Courts disregard voluntary aid and payments made under a contract, as they are quite emphatic that the defendant should not benefit from the plaintiff's investment. It can be argued that the situation here is analogous to an insurance scheme in that the plaintiff by means of taxation does contribute to the fund which provides this pension. But the defendant also contributes to this fund. On the other hand, there is the argument that to disregard pension payments made would conflict with the common law doctrine that damages in tort are primarily compensatory.[20] If he did pay, then the plaintiff would receive an amount greater than that which the jury assessed as his actual damage. Windeyer J. claimed[21] that the decision does not cut across the principle that damages are compensatory and not punitive as there is no mitigation where there is an express or implied intention that the bounty is to be enjoyed in addition to any other rights which the plaintiff has. This problem was discussed in the Beveridge Report[22] in England where

[16] Australian decisions which support the conclusion of the High Court as to future payments include *Cook v. Marshall Sawmilling Co. Pty Ltd* (1960) 77 W.N. (N.S.W.) 40, *Fraser v. Maxwell* [1959] Q.S.R. 322, and *Shuter v. Crosby* [1956] V.L.R. 47.

[17] See *Baker v. Dalgleish Steam Shipping Co.* [1922] 1 K.B. 361, and *Attorney-General for New South Wales v. Perpetual Trustee Co. Ltd* (1952) 85 C.L.R. 237, 292.

[18] (1961) 35 A.L.J.R. 4, 16.

[19] See Parsons, 'Mitigation of Tort Damages for Loss of Wages' (1955) 28 *Australian Law Journal* 563.

[20] The question of damages was fully discussed by the House of Lords in *British Transport Commission v. Gourley* [1956] A.C. 185. Lord Goddard claimed that the plaintiff should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened (at 206). Lord Jowitt claimed that the defendant is liable only for such damages which by reason of his wrongdoing the plaintiff sustained (at 202).

[21] (1961) A.L.J.R. 4, 16.

[22] Social Insurance and Allied Services, Report by Sir William Beveridge, Cmd No. 6860 (1946).

it was said that an injured person should not have the same need met twice over. The statute incorporating the Report[23] reached a compromise between the two views. It reduced damages by one half of what is received over the first five years. Denning J. suggested a solution to the problem by making the defendant pay the full amount of damages whilst the plaintiff had to return the payments he had received.[24] This solution is not supported by the authorities.

Following *National Insurance Co. of New Zealand Ltd v. Espagne* were two more High Court decisions which both affirmed the unanimous conclusion in that case. In *Paff v. Speed,*[25] the earlier case, the plaintiff, a police constable at the time of the accident, brought an action for damages for personal injuries caused by the defendant's negligence. He claimed that he lost the pay, emoluments, promotion and 'other benefits' which he would have otherwise gained as a police officer. Because of the physical unfitness caused by the accident, the plaintiff was compulsorily retired from the force and received a pension under the Police Regulation (Superannuation) Act 1906, the total value of which was £13,000. At the trial evidence was led on his behalf as to the pension he might have expected to receive had he remained in the force until he was sixty. The defendant's evidence concerning the present pension of the plaintiff was admitted. The jury awarded the plaintiff £17,500 general damages. The Full Court of the Supreme Court of New South Wales, on appeal, ordered a new trial on the basis that the jury must be taken to have thought his damage to represent £17,500 plus the value of the pension (£13,000) which totalled more than £30,000 and could thus be termed excessive. On appeal, the High Court (with Fullagar J. dissenting) held that the verdict should be considered without specific reference to the present value of the pension which the plaintiff was in fact receiving, and so considered the verdict was not excessive. The dissenting judgment of Fullagar J.[26] seems to be insufficiently explained, and would appear to conflict with his very brief judgment[27] in *Espagne's Case* unless he regarded the sections of the Police Regulation (Superannuation) Act as implying, on the part of the legislature, an intention that the pension should be enjoyed in diminution of and not in addition to any claim for damages. There is no evidence of this in His Honour's judgment. It can be argued that Fullagar J. regarded the pension as a direct incident of the plaintiff's career thus making it relevant to loss of earning capacity.

It was held by the High Court that because of the way the plaintiff put his case, it was open to the defendant to adduce evidence of the pension that the plaintiff was in fact receiving. The plaintiff claimed he had lost 'other benefits' and thus it was open to the defendant to show that he had received certain of these benefits notwithstanding his early retirement. Had the plaintiff eliminated his claim of 'other benefits' then evidence concerning the pension would probably have been admissible, even though Windeyer J. claimed that there is no general rule governing the admissibility of pensions of all sorts in all cases of personal injury.[28]

[23] Law Reform (Personal Injuries) Act 1948 (U.K.).
[24] *Dennis v. London Passenger Transport Board* [1948] 1 All E.R. 779.
[25] (1961) 35 A.L.J.R. 17.
[26] *Ibid.* 21.
[27] (1961) 35 A.L.J.R. 4, 7.
[28] (1961) 35 A.L.J.R. 17, 24.

Finally there was the decision in *Graham v. Baker*[29] where the plaintiff received from his employer sick leave payments before his retirement and a pension after his retirement. The High Court held that in assessing the plaintiff's damages, (1) the sick leave payments should be taken into account and (2) the pension should not be taken into account. Their Honours[30] claimed that whether the sick leave payments were wages or not depended on the terms of the contract. If the rendering of services was a condition precedent to the receipt of wages then the sick leave payments could not be 'wages' and would be disregarded in the assessment of damages. But here the contract gave full pay in certain conditions. These conditions did not require the rendering of services and the payments were wages.

National Insurance Co. of New Zealand Ltd v. Espagne and *Paff v. Speed* were accepted as good law but whether the causation test of Menzies and McTiernan JJ. or the purpose test of Dixon C.J. and Windeyer J. will be followed is open to doubt. The Courts will probably tend towards the purpose test.

R. MERKEL

CHAPMAN v. HEARSE[1]

Negligence—Duty of care—Collision between motor vehicles—Rescuer killed—Novus actus—Contribution

In September, 1958, an accident occurred on a main highway near Adelaide, South Australia. Weather conditions were bad and visibility on the road was poor, because of both the rain, and the absence of street lighting (which had failed at that particular spot). Chapman, the original defendant, was travelling along the highway when the car in front of his began to make a right turn at an intersection. Chapman, in attempting to avoid hitting this car, swerved back from its right side, and, grazing its rear left side, turned the first car over, and he himself was deposited on the road. Among the first on the scene was a Dr Cherry, who went to attend to Chapman lying on the road, whilst several other bystanders attended to injured persons in the first car. Moments later, a car driven by Hearse struck and fatally injured the doctor attending Chapman.

In consequence of this accident, an action was brought by the Executor Trustee Company, acting on behalf of the doctor's widow and children under the provisions of the South Australian Wrongs Act 1936-1956, against Hearse and Chapman. Hearse, by his statement of defence, denied that he was negligent and alleged contributory negligence on the part of the doctor. He also claimed that in the event of his being found liable, he should be entitled to contribution from Chapman to such an extent as the Court should deem just and equitable. The learned trial Judge, Napier C.J., found that Hearse was negligent in the control and management of his car, and ordered him to pay £16,584 damages. He also found Chapman,

[29] [1962] Argus L.R. 330.
[30] Dixon C.J., Kitto and Taylor JJ.
[1] (1961) 35 A.L.J.R. 170. High Court of Australia; Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ.